No. 6173.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Grace E. Low,
Appellant,
vs.
Sutherlin, Barry & Company, Inc., and John E. Sutherlin,
Appellees.

APPELLANT'S BRIEF.

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STATEMENT OF THE CASE.

Appellant brought her action against appellees for damages. Appellee's demurrers to the original complaint were sustained with leave to amend. Demurrers were taken to the amended complaint and judgment of dismissal with prejudice was entered on the 14th day of October 1929. The appeal is taken from said judgment.

Briefly, the complaint as amended sets out:

That in June 1925, appellant owned valuable and productive real property in Los Angeles county, including a large apartment house on West Fifth Street, Los Angeles, almost adjacent to the Biltmore Hotel, Los Angeles,

known as the "Engstrum Property", and certain land and bungalows at the beach city of Venice.

That prior to June 1925, appellant found herself in a situation that required the borrowing of a large sum of money to refinance obligations on said properties. That at the moment appellees, through John E. Sutherlin, president of Sutherlin, Barry & Company, Inc., proposed loaning to appellant $360,000, but in so doing contemplated and initiated a scheme and device to procure unto themselves the properties of appellant through a plan, suggested by appellees to appellant, of issuing and selling her bonds, secured by all of her said property, the said bonds to be sold only to appellees, and at 90¢ on the dollar;

That the said plan of appellees was carried out in all its legal details, each and every document being prepared by appellees and executed by the parties with no acts on appellant's part other than the mere formality of signing the papers presented to her by the appellees; the part of the appellant in the transaction being well expressed in the words of the complaint, as amended, to-wit: that she was without financial or business experience, had no knowledge of bond issues or similar financial transactions, was laboring under great mental stress and worry by reason of the physical collapse of her husband, and harassed by the demands made upon her to meet the obligations then pressing upon the said properties.

That in carrying out said scheme, appellees saw to it that all of the charges, expenses, fees and costs were borne and paid by the appellant alone; that representations were made by the appellees to appellant that their

investigation and their wide and varied experience convinced them that the property would realize sufficient income to pay all interest, costs, and charges of whatsoever kind in connection with the bond issue, and leave a sufficient sum over and above such requirements to enable her to refurnish the said Engstrum property; that appellant accepted the said statements as true, and entered into the transaction with full reliance upon said representations.

That appellees carried through the scheme which ultimately resulted in the foreclosure of the trust indenture given by appellant as security for the bonds, and that by reason thereof appellant lost, not only the said Engstrum property, but in addition thereto all of the furniture and fixtures therein, notwithstanding the fact that said furniture and fixtures were not included in said trust indenture.

That the methods by which appellees induced appellant to enter into the financing plans, as well as the methods followed by the appellees subsequent thereto, were fraudulent, and that by reason thereof appellant, was damaged in a large sum.

I.

The Court Erred in Sustaining the General Demurrers and Dismissing the Case.

Shea v. Nilima, 133 Fed. 209.

> "Where a complaint states the substantial facts which constitute a cause of action, or they can be inferred by reasonable intendment from the matters set forth, it will be held sufficient, in the absence of a motion to make it more definite and certain, not-

withstanding imperfections of form or the omission of specific allegations."

White v. Lyons, 42 Cal. 279.

"If the complaint states facts which entitles the plaintiff to relief, either legal or equitable, it is not demurrable on the ground that it does not state facts sufficient to constitute a cause of action."

James v. Schafer, 70 Cal. App. 372, at p. 380.

Although private transactions are presumed to be fair, and free from fraud, the rule is governed by certain exceptions.

Confidential Relationship.

Cox v. Schnerr, 172 Cal. at p. 378.

"And this rule does not apply merely to those who bear a formal relation of trust . . . It applies in every case where there has been a confidence reposed which invests the person trusted with an advantage in treating with the person so confiding. (2 *Jones on Evidence*, ed. of 1913, sec. 190.)"

"In every transaction of this kind, one who holds such confidential relation will be presumed to have taken undue advantage of the trusting friend, unless it should appear that such person had independent advice and acted not only of his own volition, but with full comprehension of the results of his action."

In the case cited, *supra*, is one where the grantee of a deed held a judgment status over a woman of weak mentality and secured the execution of the deed to himself.

Ross v. Conway, 92 Cal., p. 632,

is a case restating the rule where the defendant was a pastor of a church, whereas the grantor was of weak mind and approaching death.

Odell v. Moss, 130 Cal., p. 352,

restates the rule where the deal was between brother and sister, and the court declares there was no technical confidential relationship, but that the relationship was "superinduced" "*as a matter of fact*".

Allegations Sufficient to Show Fraud by Reason of Confidential Relationship.

In the instant case, appellee John E. Sutherlin was the president and major owner of appellee Sutherlin, Barry & Company, Inc., a company specializing in financing hotels and apartment houses, under bond issues, according to his own statements, and had "wide and varied experience behind him." [Tr. p. 120.] He sought out the appellant. [Tr. p. 119.]

Appellant was not only without business experience but was so harassed about her business and worried over the physical collapse of her husband and the difficulties into which she had been suddenly thrust, that she was not possessed of the mental stability to grasp or comprehend the figures set up and statements made by said appellee, which facts she recited to said appellee John E. Sutherlin, and all of which he knew. [Tr. pp. 120, 121.] In other words she was at the time in a condition best described as "mental confusion".

If one person approaches another and asks him to enter into a business deal and the answer is, "all right, but I am under great mental stress and will simply have to rely on you," and if the proposer goes ahead and the promisor has no independent advice, has not the proposer assumed a confidential relationship in law as well as in fact?

If the law looks merely to the reason for confidential relationship, the element of long association and dependency becomes a necessary factor; but if it is merely a question of fact, then, we submit, time or prior dependency has nothing to do with it. The instant case is one of confidential relationship, wherein appellees not only proposed to secure the writings appearing, but assumed the character and status of confidential advisors, "to the end that they would utilize their wide and varied financial experience and prepare for her a careful and conservative 'set-up' upon which in all future negotiations, plaintiff might safely act." etc. [Tr. p. 120.]

The pleadings might have stated that the appellees approached appellant while she was mentally ill, knowingly so, and persuaded her to accept their proposition, with the facts and figures, as confidential advisors; that they set forth figures which appellees knew that appellant did not understand, and that appellant executed their papers solely in reliance on the false representations of appellees as to the matters concerned; but it would not then have stated the facts one whit more to the point.

The conclusion is inevitable, that the appellees did assume toward appellant a confidential relationship upon which she had a right to rely.

II.

The Allegations Were Not Mere Statements of Opinion, But Constituted Fraudulent Representations.

The gravemen of the complaint so far as representations are concerned, was in the statements of appellees that they knew all the charges, expenses, costs and out-

lay required in the transaction and that *"the money derived from the sale of said bonds would be sufficient for all the requirements of said transaction and provide a large sum additional which sum appellant would be required to use for the renovating and refurnishing of said Engstrum property in order that it might earn the income estimated by appellees in said set-up"* [Tr. p. 121], and "that appellees well knew that there would not be any sum remaining after paying the charges and expenses, as aforesaid." [Tr. p. 123.]

Stated as *facts,* these allegations were not opinions. This is particularly true because of the basic fact that appellees held themselves out to be, and presumably were, *financial experts as to bond issues.* Not only that, but the question of the amount of the charges, expenses, etc., *were absolutely material* to the transaction, and appellant relied upon them as facts.

> *Barron Estate Co. v. Woodruff Co.*, 163 Cal. 561, at p. 573;

illustrates the point:

> "Thus the opinion of an expert employed to report upon a mine would be but the expression of his judgment and if honestly, though mistakenly, made of course no injury cognizable in law, equity or good morals could result. But instantly that the expert expresses a dishonest opinion, though it still be but an opinion, he has made himself liable in an action for deceit."

Also, on page 574, *supra*:

> "For, while it is true, as is argued on behalf of respondents, that because of the fact that the plans and specifications had not been settled upon and agreed to, it was an impossibility for any human

> being to state . . . what the exact cost of the building would be, and that therefore the language at most could be but an expression of defendants' opinion, the answer is that in this day of architectural skill and business knowledge of construction in connection therewith, any competent architect . . . can name as matter of fact a figure beyond which the cost will not go. Such a statement is a *statement of fact* . . ."

The contingencies and elasticity of the costs of building are infinitely greater than the mere set and established costs and charges incident to a bond issue, all of which would be within the absolute knowledge of an expert on such matters. The statement was not an opinion; it was a material fact statement. This court is referred further to

Herdan v. Hanson, 182 Cal. 538;
Crandall v. Parks, 152 Cal. 772, at p. 776;
Groppengiesser v. Lake, 103 Cal. 37.

III.

The Vital Fraudulent Representation Alleged Was Not Inconsistent With Exhibits Attached to the Complaint.

The theory of appellee's argument upon the demurrers as to the foregoing is that, no matter what the "set-up" might have shown, or failed to show, in the way of alleged false representations the agreements executed by appellant are in absolute denial.

Exhibit "A" [Tr. p. 27, subdiv. d.] provides that "the owners' shall maintain fire and earthquake insurance and boiler insurance and rental insurance. The same exhibit shows [Tr. p. 29, paragraph sixth] that, inferentially,

appellant was to be liable for a state corporation permit to issue said bonds, etc. It also showed that any special assessments must be met by appellant. In paragraph ninth [Tr. p. 30] further charge items were set forth in detail, but there was not one word as *to the amount of any charge.*

The theory of appellant's complaint is that appellees knew every charge, the precise amount of every charge; and set them down in black and white *falsely* and fixed a total sum that was false; that they represented falsely the return of sale, the same being in a set-up which appellants made and retained lest appellant discover the deception. In only one possible particular does this exhibit offer any inconsistency with the charges of the complaint and that is in the matter of the $36,000 to be retained as sales discount. Appellant alleges she had no knowledge of this and was lead to believe she would receive the entire $36,000 as if it were in truth a loan.

Yet here is a written statement that the bonds are to be sold at 90; and in another exhibit that the net price to appellees was to be 90¢, and so on.

If these parties were on an equal footing, and if there was an understanding by appellees that these writings were executed after appellant had digested and understood them, then the citations as to inconsistency might prevail; but the pleadings set forth that not only were they not on an equal footing, but that appellees knew that appellant did not understand the writings, or their effect or import when she executed them. The pleadings set out that the said applications for a permit and

the entire proceedings were carried on solely by appellees [Tr. p. 129], and that it was all without the knowledge of appellant, either as to the details or practical import thereof, and appellees at all times well knew that "appellant had no comprehension or understanding of the ultimate effect of said permit". [Tr. p. 129.] The complaint might have also added "nor agreements as set forth in Exhibits "A" and "B"; the omission however, was not fatal, if for no other reason, than the question involved is not vital, and the point is not germane to the fraud, and bears only on the bonus of $36,000 to appellees who solicited a *loan;* who unfolded a *lending plan*, secured a permit; who carried on the negotiations without the presence of appellant, and then *"bought"* and retained, the bonds not from a *corporation* but from an *individual,* and who were the actors in moving to foreclose appellant. Appellant merely signed on the dotted line, blindly trusting appellees in every step taken to carry out a transaction of the precise nature set out to be consummated by them from the outset, knowing that appellant did not have knowledge of such matters, and at no time understood and grasped the idea of a bond *purchase price.*

It was not necessary to say that appellant did not *read* the writings involved. The ultimate fact is not in her reading or not reading them, but in the fact that appellees *knew* she did not grasp, understand or realize that she was attaching her name to writings under which she was to permit appellees to have $36,000 of the money she borrowed.

IV.

Any Inconsistency Was Excusable Under the Circumstances by Reason of Appellee's Assurances of Identity of Content.

In

Mazuran v. Stefanich, 272 Pacific Rep., p. 733 (Cal. App. Civ. No. 6564),

we have the language covering a case where the complaint alleged that defendants did not read a contract executed by them because they relied on the false statement of plaintiff that it contained precisely the services previously promised and agreed upon orally, to-wit:

> "We are inclined to the view, announced in this quotation that, upon a clear showing that a written instrument was executed by one party to it without reading it, in the belief, induced by the fraudulent representations of the other that its provisions were different from those set out, the courts should set the agreement aside."

In

Wenzel v. Shulz, 78 Cal. at p. 223,

occurs the following:

> "That the plaintiff insisted upon the immediate execution of the note, and repeatedly declared to the defendants that it was just the same as the other note, etc."
>
> "Appellant whistles these facts down the wind, saying that 'it does not appear therefrom that any relation of especial trust or confidence existed between the parties, or that defendants did not have full and equal opportunity with plaintiff to acquire knowledge of the contents of the note,' etc. But the court finds, upon ample evidence, that the plaintiff intended to deceive defendants, and that they

> were in fact deceived by his statements as to the contents of the note."

In the instant case, the demurrers *ipso facto,* admit the facts pleaded by appellant;

Togni v. Taminelli, 11 Cal. App. at p. 14,

discussing a similar case, says:

> "Nothing is more common than for a party who has agreed to give a deed or other contract relating to some specific subject, to sign it upon being told that it is the deed or contract which had been orally agreed to. The party who so signs has not exercised the greatest degree of care, but that will not excuse a party who intentionally misleads him. No one has a right, either in law or in morals, to complain because another has placed too great a reliance upon the truth of what he himself has stated."

But even the cited case did not show that the appellees knew that appellant was at the moment in such a condition of mental confusion that the contents of the contract was impossible of appellant's comprehension and that the only thing appellant really understood was that the agreement was to the effect that all her debts were to be cleared, with sufficient moneys over and above all costs of the transaction to completely rehabilitate her apartment house so that she could realize the income necessary to meet the demands under the trust indenture.

Knight v. Bentel, 39 Cal. App. 502,

is also referred to in support of the same rule.

V.

Fraud Is Alleged With Great Particularity Where the Representations Are Shown, Their Falseness Is Alleged, and Their Materiality Is Apparent Upon the Face of the Complaint.

Civil Code of California, Sec. 1571.

"Fraud is either actual or constructive."

Civil Code of California, Sec. 1572.

"Actual fraud, within the meaning of this chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract:

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

2. . . .

3. The suppression of that which is true, by one having knowledge or belief of the fact;

4. A promise made without any intention of performing it; or,

5. Any other act fitted to deceive."

It is not necessary to allege the acts in entirety but if the charges are sufficiently specific to show a tort against plaintiff in the premises it constitutes good pleading.

In the last analysis appellant alleges that she was in a condition of mind equivalent to mental confusion and lack of understanding; that appellees, knowing this, with intent to deprive her of her valuable equities in her properties without consideration, led appellant to impose complete faith and trust in their honesty and ability, and then showed her a mass of figures which appellees declared amounted to the ultimate fact that she could bond her

properties to them for $360,000; that after paying all of her obligations, costs and expenses of every kind there would be enough left to completely rehabilitate and refurnish her Engstrum apartments, permitting an income of some $60,000 a year, sufficient to pay off the bond principal and interest upon that she relied and signed every paper presented by appellees without comprehending the language or purport thereof.

VI.

The Fraud Alleged Rests Entirely on the Question Whether the Appellees, Knowing That Appellant Would Not Discover the Falsity of Their Representations, and of Her Reliance Thereon, Carried Out a Transaction to Appellant's Damage.

It has been said that:

> "Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party and unknown to him, as the basis of an agreement; and he is under no obligation to investigate and verify statements to the truth of which the other party with full means of knowledge, has deliberately pledged his faith."

Dow v. Swain, 125 Cal. 674;
Teague v. Hall. 171 Cal. 668;
Providence Jewelry Co. v. Nagel, 157 Cal. 497;
Davis v. Butler, 154 Cal. 623;
Knight v. Bentel, 39 Cal. App. 502;

(That the car was new and that contract was similar to previous contract.)

Carr v. Sacramento C. P. Co., 35 Cal. App. 439;
Morris v. Fiat Motor Sales Co., 32 Cal. App. 315;
Togni v. Taminelli, 11 Cal. App. 7 (*supra*);

(Deed supposed to be released.)

Neher v. Hansen, 12 Cal. App. 70;

Vance v. Supreme Lodge of F. B., 15 Cal. App. 178;

Gratz v. Schuler, 25 Cal. App. 117;

Gleason v. Proud, 31 Cal. App. 123.

It has also been said:

"Where one is justified in relying, and in fact does rely, on false representations, his right of action is not destroyed because means of knowledge is open to him. In such a case no duty rests upon him to employ such means of knowledge."

12 *Cal. Jur.,* 759;

Teague v. Hall, 171 Cal. 668 (*supra*);

Tarke v. Bingham, 123 Cal. 163;

Ruhl v. Mott, 120 Cal. 668.

And the law will not permit the culprit to say:

"You ought not to believe me" or "you yourself are guilty of negligence."

Tidewater So. Ry. v. Harney, 32 Cal. App. 253;

Eichelberger v. Mills Land Co., 9 Cal. App. 628.

VII.

Appellant Did Not by Any Act Affirm the Contract or Waive the Fraud.

It may be argued, and probably will be, that because appellant signed the second contract some two months after she signed the contract Exhibit "A", and had exhausted her resources in meeting the expenses required, she waived any charge of fraud; that therefore she could not object to the demand of appellees that she pay $5.-

900.00 additional for the alleged benefit of a third party, under threat that unless their demands were met they would withdraw, leaving appellant in a worse position, from which it would be too late to extract herself and save her property.

Had appellant's consent to pay the $5,900.00 thus demanded, been freely given, it might be said fraud was waived, but an apparent consent is not real or free when obtained through menace, duress or undue influence.

Civil Code of California, Sec. 1567.

"An apparent consent is not real or free when obtained through:

1. Duress;
2. Menace;
3. Fraud;
4. Undue influence; or,
5. Mistake."

Civil Code of California, Sec. 1575, subdiv. 3.

"Undue influence consists:

3. In taking a grossly oppressive and unfair advantage of another's necessities or distress."

On September 23, 1925, the complaint alleges, at a time when appellant was reduced to financial helplessness, appellees demanded that she then and there execute two promissory notes payable in 90 and 120 days respectively. There was no money in the trustee's hand. Exhibit "B" provided that the trustee was to "deduct the said $5,900" from the proceeds of the bond issue, from the excess she had been led to believe would be forthcoming, enough if it was available not only to pay for the rehabilitation of her apartment house, but to pay this sum as well, and that the payment of the $5,900 was to be delayed, in which event the financial safety of the property would not be jeopardized. [Tr. p. 126.]

VIII.

The Allegations in the Amended Complaint Were Sufficient to Show That Appellees, in furtherance of Their Scheme to Defraud Appellant, Brought About the Foreclosure by Which Appellant Lost Her Property.

It may properly again be noted that the amended complaint showed that the appellees found the appellant in great financial distress, inexperienced in business matters and in a state of mental confusion owing to the fatal illness of her husband at the time; that she was ignorant of bond issues, harassed by creditors, and that in this condition appellees represented that because of their long experience in financial matters and their readiness and willingness to carry out their proposed lending plan, appellant would be thereby relieved of all her debts, be able to meet all costs, charges and expenses involved in said plan, and provide herself with funds to refurnish her said property and put it in a condition to provide income to meet all interest, amortization and other payments; that appellees had the means, experience and knowledge to know and set out, if they had seen fit, precisely what would be the returns from said financing plan.

Induced by said representations, appellant signed all papers submitted to her by appellees, frankly confessing to them her ignorance thereof, and making no question, except to ask about the insurance; that she was told by appellees in response that her existing insurance would be sufficient, except for a merely nominal amount which would be taken care of out of the excess returns from

the loan [Tr. p. 127]; that so false and fraudulent were the said representations of appellees that when the returns were made upon said loan appellant had only $50.00 remaining, not even funds to pay the insurance premium [Tr. p. 132] which said insurance, instead of being nominal, amounted to $3,275.95; that this deficit, together with the acts of appellees, caused appellant's tenants to be harassed by garnishments in an action to collect one of the $2,950 notes [Tr. p. 131], resulting in her income being depleted, together with the entire failure of funds to rehabilitate the property, and in March 1926, less than one year from the initial contract, led to the initiation by the appellees of the foreclosure proceedings and the sale of appellant's property which was bought in by the appellees at approximately less than one-half its value.

We will not go fully into the final act of appellees whereby they secured plaintiff's signature to a writing to turn over to them her Engstrum property management and she went out to secure a third party who would pay the money they demanded, upon their promise that if she did the best she could do they would postpone the sale until October 5, 1926. The spirit of the contract was that if she did the acts mentioned and secured a third person they would restore her rights. Whatever may have been the tricks of the language they employed, or the subterfuge of the appellees as to termination of the time element, the spirit, if not the actual requirements of that contract were met on August 12, 1926, the date of the sale, when Rodolfo Montes stood ready, willing and able to meet all the demands of appellees in the premises; but appellees would not wait the few minutes

required, and sold the property to themselves at less than half its value, and took over, besides, more than $30,000 of plaintiff's personal property not pledged under the trust indenture.

Appellant prays that the order appealed from be reversed, and that if her amended complaint be in any way deficient, she be allowed to properly amend it.

Respectfully submitted,

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